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APR - 4 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 4, 1991

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Amendment of the the Commission's Rules
Regarding Grandfathered Short-Spaced
Stations
RM-7651

Dear Ms. Searcy:

I am transmitting herewith on behalf of Par Broadcasting Company an original and nine copies of a "Statement In Support of Joint Petition." The Statement is filed pursuant to Section 1.405 of the Commission's Rules in support of the above-captioned petition for rulemaking.

The petition appeared on the Commission's Public Notice of March 6, 1991 (Report No. 1839).

Please contact me if there are any questions in connection with this matter.

Very truly yours,



Christopher C. Smallwood

CCS/md
Enclosures

Before The
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of the Commission's Rules)
Regarding Grandfathered Short-)
Spaced Stations)

RM-7651

To: The Commission

STATEMENT IN SUPPORT OF JOINT PETITION

Par Broadcasting Company, licensee of Stations KGMG AM/FM, Oceanside, California ("Par"), is submitting this statement in support of the above-referenced petition for rulemaking. This statement is filed under Section 1.405. The petition identifies a substantial inequity in the Commission's FM rules. The inequity adversely impacts a number of FM stations. The petitioners offer a proven remedy which can be easily administered. Par urges the Commission to expeditiously act on the petition and issue a Notice of Proposed Rulemaking looking towards adoption of the petitioners' suggestions. Par expects that the record which would be generated in a rulemaking docket will convince the Commission to make the rule change advocated by the petition.

BACKGROUND

The petition was filed on February 1, 1991, by the consulting engineering firms of Hatfield & Dawson; du Treil, Lundin & Rackley, Inc.; and Cohen, Dippell and Everist, P.C. The petition appeared on a Public Notice (Report No. 1839) of March 6, 1991.

The petition in essence requests the Commission to undo a revision of Section 73.213 made in 1987. That change was promulgated in the "Second Report and Order" in MM Docket No. 86-144, 63 RR2d 1262 (1987). The petition basically asks that the prior version of the rule be restored.

The main problem of concern to Par involves grandfathered second- and third-adjacent short-spaced FM stations. Under the former version of the rules, which had been in effect for about twenty-two years, these stations were freely permitted to move their transmitters and increase their facilities to the maximum otherwise allowed for their particular class. This was so even if the separation would have been further shortened. 47 CFR 73.213(f)(2)(i) (1987 Edition). Under the new version, these increases can be made only upon consent of the short-spaced station. Section 73.213(a).

Par supports the petition for the following reasons.

1. THE CURRENT VERSION OF SECTION 73.213 PROHIBITS SOME STATIONS FROM MOVING IN ANY DIRECTION

The current version of Rule 73.213 prohibits (in the case of short-spaced stations) any move which would extend the predicted 1 mV/m contour of the one station toward the 1 mV/m contour of the other. Section 73.213(a). The new version has had an unintended consequence. Our 1 mV/m contour is encompassed by the corresponding contour of a third-adjacent short-spaced station. The rule prohibits stations such as ours from moving in any direction--even away from the transmitter of the third-adjacent station, since that would literally move our contour "toward"

that of the other. Although this is a fairly absurd result, we are informed that this kind of situation is not uncommon. We support the restoration of the old rule so this anomaly can be removed.

2. THE NEW RULE CAN INCREASE, RATHER THAN DECREASE, THE
LIKELIHOOD OF INTERFERENCE

One can search in vain through the "Second Report and Order" in MM Docket No. 86-144 for any evidence of real-world interference problems caused by the earlier rule. The Commission referred only to an evidently hypothetical "risk" of interference under the old rule (63 RR2d at 1271). But the petitioners correctly point out as follows (page 9, emphasis in original):

Indeed, permitting this type of facility increase [i.e., as proposed by petitioners and permitted under the prior version of Section 73.213] could reduce interference to a second- or third-adjacent station. This is so because the improved signal may be able to serve areas and populations otherwise subject to interference.... Thus, under the guise of protecting against the hypothetical "risk" of interference (63 RR2d at 1271), the Commission actually perpetuated a scheme whereby "actual" interference can continue to exist.

Our own experience offers a graphic example of the situation petitioners allude to. In 1989 (that is, after the effective date of the current version of Rule 73.213), we filed an application (File No. BPH-890511IC) to move our FM transmitter closer to the site of our third-adjacent short-spaced neighbor. As our application showed, the proposed move would have reduced the predicted interference areas, both mileage and population, as follows (Engineering Statement of November 15, 1989):

- The interference area (considering interference to the third-adjacent station from Par) would have been reduced 58.8% in terms of population.
- The interference area (considering interference to the third-adjacent station from Par) would have been reduced 53.3% in terms of mileage.
- The interference area (considering interference from the third-adjacent station to Par) would have been reduced 43.7% in terms of population.
- The interference area (considering interference from the third-adjacent station to Par) would have been reduced 50.4% in terms of mileage.

Relying on a strict reading of the language of the new rule, nevertheless, the Commission's staff denied our application (8920-DEB/SBS; April 27, 1990).

These figures dramatically illustrate petitioners' argument that restoring the prior version of the rule could, in circumstances such as ours, reduce interference--even when a licensee relocates its transmitter in the direction of its short-spaced neighbor.

The staff letter denying our application pointed out (page 4) that, under the current rule, one mechanism does exist whereby we could have effectuated our proposal: to procure the other station's agreement.¹

¹ The rule also requires a public-interest showing in addition to the other station's consent.

However, the Commission should be aware that such purported relief is illusory. Any two stations to whom the rule applies are likely to be competitors. Absent any countervailing benefit², the non-moving station will exercise a veto over the other's attempt to improve its facilities and its competitive stance in the market.

Surely the Commission's mandate to consider the public interest should foreclose the private bartering of improvements in service.

The Commission had it right the first time. In 1964, the Commission looked at the risk of interference and concluded that grandfathered second- and third-adjacent stations should be allowed to maximize their power and height (Revision of FM Rules, 3 RR2d 1571, 1582-3 (1964)):

Because of the restrictions which would be imposed, the usually small amount of additional interference resulting, and the overall benefits to be obtained on balance, we will permit stations to disregard short-spaced stations on second and third adjacent channels in making requests for increased facilities.

This approach was correct then. The Commission should adopt it again.³

² Evidently the rules would permit the applicant station to "buy" the other's necessary consent to its upgrade.

³ At the very least, if the Commission decides not to reinstate the former Section 73.213, it should make this clarification: licensees such as Par are entitled to prosecute a waiver request in which data showing improvement of interference areas and populations will be considered by the Commission, regardless of whether the licensees are successful in obtaining the other station's consent.

3. LICENSEES SHOULD HAVE THE GREATEST POSSIBLE FLEXIBILITY

Radio licenses are granted to serve the public. Since the risk of interference under the prior version of Section 73.213 was slight or nonexistent, there is no purpose in denying FM licensees the flexibility they enjoyed under the former rules. Stations should be permitted the greatest possible leeway in their technical proposals. The current rule as applied can have the effect of denying certain areas an additional media voice, which is not in the public interest.

4. THE CURRENT RULE RESULTS IN ADMINISTRATIVE INEFFICIENCY

We are informed that we are hardly the only FM licensee which has been involved in litigation before the Commission under the new Section 73.213. The petition points out (page 9) that an advantage of returning to the older system is that it would be "extraordinarily convenient to administer." Since the new rule does not further the goal of reducing interference, or any other public-interest purpose, it makes no sense to waste the Commission's time and resources in dealing with the many problems that have arisen under it.

CONCLUSION


The petition points to a real difficulty with the current FM rules. The modifications to Rule 73.213, although made by the Commission with the best of intentions, have had the ironic result of preventing licensees such as Par from reducing

interference areas and populations. We urge the Commission to move speedily forward with the proposed rulemaking and to reinstate the former version of the rule.

Respectfully submitted,

PAR BROADCASTING COMPANY

By:


Stephen O. Jacobs
Partner

Date: 3/22/90

CERTIFICATE OF SERVICE

I, Christopher C. Smallwood, certify that I have this 4th day of April, 1991, caused to be delivered via first class mail, postage pre-paid, a copy of the foregoing "Statement In Support of Joint Petition" to the following:

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